Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

MICHAELA I. ALEXANDRU,
Petitioner,

v.

NORTHEAST UTILITIES SERVICE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN F. KARL, JR. *
MCDONALD & KARL
900 17th Street, N.W.
Suite 1250
Washington, D.C. 20006
(202) 293-3200

* Counsel of Record

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTIONS PRESENTED

I. WHETHER CLOSE PROXIMITY IN TIME BETWEEN THE PROTECTED ACTIVITY AND THE ADVERSE EMPLOYMENT ACTION IS A NECESSARY ELEMENT OF A *PRIMA FACIE* CASE OF RETALIATION.

II. WHETHER THE SECOND CIRCUIT'S RULING THAT PETITIONER FAILED TO PRESENT A "LEGALLY SUFFICIENT EVIDENTIARY BASIS" TO SUPPORT HER CLAIMS OF RETALIATION CONFLICTS WITH THE HOLDING OF THIS COURT IN *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*, 530 U.S. ___, 120 S. CT. 2097 (2000).

PARTIES TO THE PROCEEDINGS

The plaintiff in the District Court was Michaela I. Alexandru.

The defendant in the District Court was Northeast Utilities Service Company ("NUSCO").

According to the Corporate Disclosure Statement filed with the U.S. Court of Appeals for the Second Circuit, the parent company of NUSCO is Northeast Utilities, which owns 100% of NUSCO stock.

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MICHAELA I. ALEXANDRU,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Michaela I. Alexandru respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on January 27, 2000. App. at 1-2a.[1] A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on May 10, 2000. App. at 3a. By Order dated July 31, 2000, the Clerk of this Court extended the time for filing the Petition for Certiorari to and including October 7, 2000. App. at 7a.

OPINIONS BELOW

The opinion of the Court of Appeals, app. at 1a, affirming the lower court's judgment is not reported. The Order of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing *En Banc* is not

[1] References to the Appendix to this Petition are the page number followed by "a."

reported. App. at 3a. The District Court's Judgment and the oral opinion granting the motion for judgment as a matter of law filed by Northeast Utilities Service Company ("NUSCO") are not reported. App. at 5-6a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). By Order dated July 31, 2000, the Clerk of this Court extended the time for filing the Petition for Certiorari to and including October 7, 2000. App. at 7a.

STATUTORY AND REGULATORY PROVISIONS

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this title [42 USCS §§ 2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this title [42 USCS §§ 2000e-2000e-17].[2]

INTRODUCTION AND STATEMENT OF THE CASE

This case arises from efforts by Petitioner to vindicate her employment rights under Title VII of the Civil Rights Act of 1964. Ms. Alexandru filed her first complaints of discrimination and sexual harassment beginning in 1985, filed two grievances in 1988, and continued to complain of sexual harassment and retaliation until she was fired in early 1993.

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[2] July 2, 1964, P.L. 88-352, Title VII § 704, 78 Stat. 257; Mar 24, 1972, P.L. 92-261, § 8(c), 86 Stat. 109.

Throughout the period 1985-1992, NUSCO refused to give Petitioner meaningful assignments consistent with her experience and expertise as an engineer. Ms. Alexandru spent most days at her desk with nothing to do. Ms. Alexandru filed a grievance in 1992, which raised claims of discrimination and subsequently she filed a complaint with the Connecticut Commission on Human Rights. Shortly thereafter, NUSCO terminated Ms. Alexandru.

Title VII forbids discrimination on the basis of race, color, religion, sex or national origin.

Perhaps more importantly, Title VII forbids retaliation against employees who file charges of discrimination, oppose employment practices made unlawful under Title VII, or otherwise exercise their rights under Title VII.

This case presents the issue of whether the lower court's adoption of a *per se* rule prevented plaintiff from establishing a *prima facie* case of retaliation when the first activity protected under Title VII occurred some years earlier. There is a split in the circuits on this issue. Many circuits have adopted *per se* rules requiring dismissal on summary judgment or on motion for judgment as a matter of law, holding there can be no retaliation as a matter of law because of the extended period of time between the first activity protected under Title VII and the ultimate act of retaliation—termination of employment.

This *per se* approach stands in contrast to the better reasoned approach taken by the Eleventh and Third Circuits, which are based on careful consideration of all the evidence and any logical inferences drawn from that evidence to determine whether there are issues to be decided by the finder of fact. The Second Circuit's application of the *per se* rule prevented the jury from considering the merits of Ms. Alexandru's retaliation claims, even though there were disputes of material fact regarding the real reason for her termination by NUSCO.

This case also presents the fundamental issue of the role of the federal district court in determining which issues must be decided by a jury and when summary judgment or judgment as a matter of law is appropriate. As we show, the decisions of the courts below are in conflict with this Court's recent, unanimous decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. ___, 120 S.Ct. 2097 (June 12, 2000).

1. Ms. Alexandru's Employment History.

On August 25, 1980, Ms. Alexandru began working as an engineer in NUSCO's Generation Electrical Engineering/Instruments & Control Department. Ms. Alexandru holds a Master of Science in Mechanical Engineering.

NUSCO initially assigned Ms. Alexandru to the Generation Electrical Engineering Department where she was a competent engineer, and the only woman in her office. Ms. Alexandru performed her duties satisfactorily and enjoyed a successful career with NUSCO for the first several years of her employment. There are no adverse comments on her performance until 1985. May 10, 1999, Tr., Vol. I, 17, 40, 50.[3]

In 1985, Ms. Alexandru filed an internal grievance because of a constant pattern of sexually harassing remarks and sexually discriminatory conduct. *See* Pl. Ex. 87.[4] After Ms. Alexandru complained that her supervisor ignored her repeated requests to resolve the problem, Ms. Alexandru was transferred to another position.

NUSCO's grievance procedure culminated in a pro-management decision in May of 1985. The grievance findings acknowledged that as a result of Ms. Alexandru's grievance, Arnold Roby, her manager, spoke at least twice to

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[3] The reference "Tr" refers to the transcripts of the trial. The transcript for May 10, 1999, was transcribed in two volumes.

[4] The reference is to Plaintiff's Trial Exhibits.

three different men about their offensive behavior to Ms. Alexandru, culminating in his advice to them that, "if [your] behavior needs correcting—correct it." The offenders were not reprimanded and one was promoted. Pl. Ex. 82.

No action was taken by NUSCO apart from removing Ms. Alexandru from a position where she was succeeding and transferring her to another position in a different division. In July, 1985, NUSCO transferred Ms. Alexandru from a project where she was performing successfully to its Operating Nuclear Reactor Group, EEQ, Off Generation Electrical Engineering Department. Ms. Alexandru's direct supervisor was Bruce Tuthill and his supervisor was John Ferraro. May 10, 1999 Tr., Vol. I at 17. After her transfer, Ms. Alexandru found that all opportunities for advancement, promotion and raises were denied to her. Her overtime work was unrecognized. Rather than receiving duties commensurate with her engineering background, Ms. Alexandru was assigned menial unprofessional tasks to perform or tasks that were inherently unsafe. While eight months pregnant, she was told to inspect equipment locations inside a fully-powered nuclear reactor. NUSCO reassigned Ms. Alexandru's work and redirected credit for Ms. Alexandru's work to her male counterparts. In addition, NUSCO denied Ms. Alexandru pay raises and opportunities for educational advancement and professional training that were made available to similarly situated males.

In June, 1988, Ms. Alexandru was transferred to the Fossil Hydro Engineering Department. Ms. Alexandru's direct supervisor was Walter Kornacki and her second level supervisor was Robert Smart. May 10, 1999, Tr., Vol. I at 417.

Once again, Ms. Alexandru was left to sit at her desk and not given any assignments. May 10, 1999, Tr. Vol. II at 42. Mr. Kornacki told Ms. Alexandru that "he had more than enough engineers in this group and that he expected me to display my female talents." May 10, 1999, Tr. Vol. II at 42.

During the following three years, Ms. Alexandru was denied assignments commensurate with her experience and skill as an engineer and had almost nothing to do. When NUSCO gave Ms. Alexandru work, she was requested not to sign the work and most of the tasks to which she was assigned were menial, requiring little or no skill. In addition, Ms. Alexandru was given poor performance evaluations based in large part on the fact that she could not demonstrate accomplishments in her position precisely because she had nothing to do.

2. The Termination Process.

On April 24, 1991, Messrs. Kornacki and Smart, Ms. Alexandru's immediate supervisors, assigned her to a six to eight week project counting fish. Pl. Ex. 223. Ms. Alexandru was to be assigned to stand on the unprotected sides of a water canal in Holyoke, Massachusetts, where there was no security protection, for eight hours per day to watch fish entering the river. Ms. Alexandru objected on the grounds that the fish counting assignment did not require engineering or technical skills and she would not be working in a supervisory capacity. *Id.* Ms. Alexandru was told the assignment required pulling buckets of fish out of the water, counting them and then dumping the fish back into the river. Mr. Smart claimed that "the project had to be manned day and night," May 18, 1999, Tr. at 170, but never explained how Ms. Alexandru was supposed to see and count the fish in the dark.

Ms. Alexandru sent Mr. Kornacki a memo expressing her concern that she would have to drive through a dilapidated and unsafe neighborhood and that a woman standing on the canal at dark exposes herself to violence and crime. The "fish counting" assignment also required Ms. Alexandru to make a daily round trip of two hours from her home to Holyoke, Massachusetts. Nevertheless, Ms. Alexandru indicated a

willingness to count fish, as long as she could do so in daylight. Pl Ex. 27.

On April 30, 1991, Mr. Kornacki responded to her concerns by claiming that the assignment was "part of a very important project." Pl. Ex. 226. However, Mr. Smart testified at trial that Ms. Alexandru was the only person "that was asked to take that assignment." May 18, 1999 Tr. at 171. Despite Ms. Alexandru's statement that she was willing to count fish during the daylight, Mr. Kornacki ignored her request that she be assigned to track fish only in daytime and characterized her written response as refusing the assignment, even though she had not actually done so. Pl. Ex. 226. Mr. Kornacki advised Ms. Alexandru that there was "no alternative assignment but we will try to find something for you." *Id.*

On May 14, 1991, Ms. Alexandru continued her efforts to obtain assignments commensurate with her education and experience by reminding Mr. Kornacki that "two engineers left our department leaving a number of projects and engineering tasks available." Pl. Ex. 225. Ms. Alexandru requested that the projects left undone by the departure of these two engineers be assigned to her because of her excellent qualifications and because she had in fact "developed the technical basis for some of this work." Pl. Ex. 225. NUSCO never formally responded to this request, and continued to fail to assign her work for many months.[5] Ms. Alexandru testified at trial that whenever she asked for assignments, her supervisor, Mr. Kornacki "would make a rude gesture and tell me to go back to my desk." May 10, 1999, Tr., Vol. II at 42.

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[5] As part of its effort to force Ms. Alexandru to resign, she was given assignments to climb stacks and crawl through ducts. May 10, 1999, Tr. Vol II at 57; Pl Ex 283. Ms. Alexandru had never worked at great heights and had no experience in this area. NUSCO did not provide Ms. Alexandru with fall protection or other safety equipment.

In order to build a record to fire her, Messrs. Kornacki and Smart then began to conduct special surveillance of Ms. Alexandru to make certain she was at her desk, even though she had nothing to do during the period 1988-1993. Pl. Exs. 226, 227. NUSCO disciplined Ms. Alexandru for two occasions when she was away from her work station, even though she was in the bathroom. On one occasion, Ms. Alexandru stayed at the office to complete one of the rare assignments given her, even though she had been directed to go home for the remainder of the day. Ms. Alexandru's decision to complete the assignment became the basis for a charge of insubordination. Pl. Ex. 227.

Ms. Alexandru filed a grievance dated March 13, 1992 because she was concerned she was not assigned professional work. Pl. Exs. 223, 225 and 229. Ms. Linda Singer from Human Relations was one of several recipients of this grievance and grievances Ms. Alexandru had filed in the past.

On May 12, 1992, NUSCO issued its second-level rejection of the March 1992 grievance. Although the grievance was phrased in general terms of work assignments, Ms. Alexandru specifically raised the issue of whether another engineer or female engineer was given the "fish counting" assignment, Pl Ex. 279, thereby placing NUSCO on notice that Ms. Alexandru believed the "fish counting" assignment was discrimination based on her gender.

NUSCO based its eventual termination decision in part on Ms. Alexandru's performance evaluation for 1991. Yet in its February, 1992 evaluation for the prior year, NUSCO acknowledged that "there was a period of no work assignments . . . due to a lack of new projects/opportunities available to FDI." Pet. App. at 124.[6] The evaluation was, of course, suspect because, as Ms. Singer from NUSCO's

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[6] The reference is to the Appendix filed by Petitioner with the Court of Appeals.

Human Relations Department admitted at trial, if the employee had no work to do, then " there would be no way to rate your team work, your quality, quantity, your decision making, your communication skills." Pet. App at 126, 128.

NUSCO further supported its termination decision on Ms. Alexandru's alleged unwillingness to participate in the "fish counting" assignment at night. NUSCO never explained, either before or during the trial, how Ms. Alexandru was expected to count fish in the dark, or why she was the only engineer assigned to the "fish counting" project.

On June 30, 1992, Ms. Alexandru requested assignment to the NOX Reduction - Clean Air Act project because she had significant experience in this area. Pl. Ex 283; Pet App. at 60. NUSCO never responded to this request. On July 27, 1992, NUSCO issued its "third step" decision denying Ms. Alexandru's grievance. NUSCO's decision stated: "While discriminatory treatment was not specified in the original grievance points, concerns were raised by the Grievant during the grievance process that led the committee to hold discussions with a number of individuals . . . ". Pl. Ex. 291. Thus, the officials making the decision to terminate Ms. Alexandru were fully aware that she had raised issues and claims of discrimination in her grievance. Moreover, they treated Ms. Alexandru's grievance as a complaint of sex discrimination.

NUSCO investigated and addressed these claims by interviewing those previously accused of discrimination and sexual harassment by Ms. Alexandru, including Messrs. Scully, Peterson and Blanch, but failed to officially interview Ms. Alexandru herself. The Grievance Committee specifically considered the "similar grievance" filed by Ms. Alexandru in 1985 alleging sexual harassment and retaliation. In so doing, the Grievance Committee found that Ms. Alexandru's 1985 grievance lacked merit and concluded that "there was a pattern not of supervisory unfairness but a

pattern of response by the Grievant to efforts to conduct constructive appraisals of performance that is of serious concern to the Committee." Pl. Ex. 291; Pet. App. at 140.

The Grievance Committee acknowledged that it specifically considered in its deliberations the fact that Ms. Alexandru had gone through "similar experiences" in 1986 and 1987. Pet.App. at 140. The "Committee believes it is also noteworthy that [Ms. Alexandru] filed a similar grievance in 1985 regarding her review and the alleged unfairness of her supervisor at that time in discrediting her work and blocking her career and professional growth." Pet. App. at 141. NUSCO thus blamed Ms. Alexandru for having to file a grievance as a result of being the victim of sexual harassment and retaliation during the 1985-1988 period. NUSCO explicitly based its 1992 decision on its view that Ms. Alexandru's prior complaints lacked merit.

Ms. Singer testified that she sent Ms. Alexandru to a "outside" career counselor because she had reviewed her previous grievances arising from her complaints of sexual harassment and decided Ms. Alexandru had not responded in a positive way. Pet. App. at 127. Pl Ex. 298. Effective August 1, 1992, NUSCO placed Ms. Alexandru on a Performance Improvement Program for a period of 90 days. May 10, 1999,Tr., Vol. I at 17.

On August 14, 1992, Ms. Alexandru filed a complaint of discrimination with the Connecticut Commission on Human Rights. On August 21, 1992, Ms. Alexandru filed an internal grievance alleging that NUSCO had retaliated against her by harassment and intimidation, in addition to the discriminatory treatment described in her March, 1992 grievance. Pl. Ex. 303.

On November 6, 1992, Mr. Kornacki gave Ms. Alexandru an unsatisfactory rating for her performance and notified her that she had 90 days within which to apply for other positions

at NUSCO. If she failed to find another position at NUSCO by February 5, 1992, her employment would be terminated. May 10, 1999, Tr., Vol. I at 17. Ms. Alexandru applied for other positions, but was rejected for each position because of her personnel record. May 10, 1999, Tr., Vol. II at 61-69. On February 5, 1993, NUSCO terminated Ms. Alexandru, allegedly on the grounds of unsatisfactory work performance. On December 3, 1992, NUSCO issued its third-level rejection of Ms. Alexandru's grievance. Pl. Ex. 333.

3. Relevant Decision Makers.

Although the trial court found that Messrs. Smart and Kornacki, Ms. Alexandru's supervisors, were officially the persons responsible for her termination, the testimony at trial demonstrated that in fact, the Human Relations Office and NUSCO's senior management controlled all of the final decisions regarding the termination of Ms. Alexandru. Linda Singer, who was professional manager in Human Relations, testified that she was the person who made all of the arrangements, who convened the panel, who performed all of the legwork, the scheduling, and the writing and drafting of the grievance decision document for the NUSCO officers. Pet. App. at 138. Ms. Singer also testified that the decision denying Ms. Alexandru's grievance was made by Ms. Cheryl Grise, who was Vice President of Human Relations, and Mr. Bill Reckert, Vice President of Ms. Alexandru's Department. Pet. App. at 139-140. Moreover, Ms. Singer testified that Human Relations had control over Ms. Alexandru's supervisors,

> who could not issue a written warning to any employee without coming through Human Resources and having Human Resources listen to the facts leading up to the reason for suspension and making a complete review. Then we authorize whether or not they can discipline an employee.

Pet. App. at 151.

Ms. Singer further testified that the chain of command and control would hold true in suspension and no action would be taken without the permission of Human Relations. Pet. App. at 151.

4. Judicial Proceedings

Following the exhaustion of administrative remedies, Petitioner brought suit in U.S. District Court on March 14, 1995. Ms. Alexandru alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* and the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* and raised various common law claims. The only issues raised in this Petition stem from Ms. Alexandru's retaliation claims brought under Title VII.

On October 9, 1996, the district court granted NUSCO's motion for partial summary judgment, dismissing all of Ms. Alexandru's claims brought under ADA and some of her defamation claims. 1996 WL 684421 (D.Conn. October 10, 1996).

Although jury selection was completed on April 8, 1997 and trial was scheduled to commence on April 21, 1997, the district court discharged the jury. The district court directed NUSCO to refile its previously filed motions *in limine* on April 15, 1997 as a motion for summary judgment.

On December 3, 1997, U.S. District Judge Nevas denied NUSCO's motion for summary judgment on the Title VII claims, holding that Ms. Alexandru has alleged "a continuing course of discriminatory conduct by NUSCO beginning in 1985 and continuing through August 14, 1992 when she filed her EEOC complaint." 1997 WL 766885 (D.Conn December 3, 1997) at 7.

The district court conducted a jury trial from May 10, 1999 through May 21, 1999. The district court entered judgment on jury verdict on the discrimination claims in favor of

NUSCO on May 21, 1999. However, the trial court granted NUSCO's motion for judgment as a matter of law on Ms. Alexandru's retaliation claims. In so doing, the court relied on the "pretext plus" requirement which was then the law of the Second Circuit prior to this Court's ruling in *Reeves, supra*. During trial, the court explicitly stated: "All right, now you understand that not only do you have to prove that the reason that Northeast Utilities gave for terminating your employment was a pretext, but that the actual reason was sex discrimination, gender discrimination." Pet. App. at 82.

In dismissing the retaliation claims, the trial court ruled as a matter of law that Ms. Alexandru could not base her retaliation claims on the earlier grievances:

> Yes, but Ms. Alexandru, if what you're doing is addressing the retaliation claim, the lapse of time between early 1980 and the situation when you were working for Mr. Kornacki, makes the continuation of claim a problem, particularly when the grievances that were filed in the interim were not sexual harassment grievances. You can't draw—I can't allow the jury to call an inference over that lapse of time and so that the retaliation claim is out.

Pet. App. at 172.

The trial court further explained its ruling:

> No. The retaliation ruling is based on the fact that there was no showing that the persons that you claimed retaliated against you had any knowledge of the CHRO complaint, or assuming that there was an earlier sexual harassment complaint, which would constitute forbidden activity under Title 7 that they had any knowledge that you made a sexual harassment complaint. The knowledge is a necessary prerequisite to proving retaliation. It's an essential element of the case, and there is no evidence from which a reasonable jury could conclude that these people had any knowledge if either your

> sexual harassment complaint, or your CHRO complaint. That's what it's based on.

Pet. App. at 181-182. The court held:

> "There is no evidence from which a reasonable jury could find there was retaliation".

Pet App. at 184.

On May 21, 1999, Ms. Alexandru timely filed a Notice of Appeal. On January 27, 2000, the United States Court of Appeals for the Second Circuit affirmed the judgment of the district court in an unpublished opinion.

> The district court properly granted Northeast Utilities judgment as a matter of law on Alexandru's claims for retaliation . . . because she failed to provide a 'legally sufficient evidentiary basis,' Fed.R.Civ.P. 50(a)(1), on which the jury might find in her favor. Alexandru never countered the testimony of her supervisor and manager that they were unaware that she had filed any grievances. Thus, she failed to establish a crucial element of a prima facie case of retaliation—namely, that Northeast Utilities was aware of the protected activity which, she claims, led it to retaliate against her. App. at 2a.

The Court of Appeals denied the timely filed Motion for Rehearing and rehearing en banc. App. at 3a.

This Court granted an enlargement of time for filing a Petition for Writ of Certiorari to and including October 7, 2000. App. at 7a.

REASONS FOR GRANTING THE PETITION

It is of vital importance that employees who file complaints of discrimination under Title VII and other statutes be protected from retaliation by their employers. The Court should grant review of the first question presented because of the importance of the issue and to resolve a split in the Circuits as to whether an employee may establish a *prima facie* case of retaliation where a substantial period of time has passed between the protected activity and the adverse action.

The Court should grant review of the second question because the decisions of the Courts below are flatly inconsistent with this Court's ruling last term in *Reeves, supra*. In affirming the dismissal of Ms. Alexandru's retaliation claims as a matter of law, the Court of Appeals applied the Second Circuit's "pretext plus" requirement and engaged in exactly the same judicial error which was corrected in *Reeves*. The lower courts substituted their own judgment on the merits for those of the jury, which should have been allowed to decide the retaliation claims.

Numerous federal and state statutes prohibit employers from retaliating against employees who file discrimination claims based on race, sex, religion, age, ethnicity or disability.[7] There are also federal statutes prohibiting retaliation against whistleblowers.[8] Many states have enacted anti-retaliation provisions in connection with workers' compensation and whistleblower acts to protect those who file claims. Further, the First Amendment protects government employees from retaliation when they speak out on matters of public concern. *See, e.g., Harrington v. Harris*, 118 F.3d 359, 365, (5th Cir.), *cert. denied,* 522 U.S. 1016 (1997).

These anti-retaliation provisions are designed to ensure that employees may freely exercise their statutory legal rights to be free of discrimination in the workplace. These provisions serve an important public purpose by encouraging workplace integrity. In the absence of these anti-retaliation provisions, the right to be free from discrimination would be

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[7] Family and Medical Leave Act of 1993, 29 U.S.C. § 2615; Americans with Disabilities Act of 1990, 42 U.S.C. § 12203; Employment Retirement Income Security Act of 1964, 29 U.S.C. § 1140; Occupational Health and Safety Act of 1970, 29 U.S.C. § 660(c); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d); National Labor Relations Act of 1947, 29 U.S.C. § 201; Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3).

[8] 5 U.S.C.A. § 2302 (2000); and 42 U.S.C.A. Sec. § 5851 (2000).

unenforceable. "Maintaining unfettered access to statutory remedial mechanisms" is an important policy goal and a primary purpose of anti-retaliation provisions. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

In order to prevail on her claim of retaliation, Petitioner must demonstrate that she engaged in protected activity, that her employer took adverse action against her, and that there was a causal link or connection between the protected activity and the adverse action. *Carter v. Ball*, 33 F.3d 450, 458 (4th Cir. 1994). Some courts modify the *prima facie* case by adding a fourth element requiring that an employer have knowledge of the employee's protected activity. *See, e.g., Harrison v. Metropolitan Gov't of Nashville*, 80 F.3d 1107, 1118 (6th Cir. 1996). Those courts using only three elements subsume the fourth element of knowledge into the third element of causation. *See, e.g., Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982).

Petitioner need not prevail on the underlying charge to be protected under the participation clause of Title VII. *E.g., Filipovic v. K & R Express Sys., Inc.*, 176 F.3d 390, 398 (7th Cir. 1999). Thus, the fact that the jury decided against Ms. Alexandru on her discrimination claims is irrelevant for determining whether the retaliation claims should have gone to the jury.

The employee's burden of satisfying the elements of a *prima facie* case is not onerous; rather a *prima facie* showing is "quite easy to meet." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 250 (1981). The ruling below violated this basic precept.

Where the plaintiff establishes a *prima facie* case under the burden-shifting approach established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the defendant must articulate a legitimate nondiscriminatory reason for its adverse employment action. *EEOC v. Avery Dennison Corp.*,

104 F.3d 858, 861 (6th Cir. 1997). Once the defendant has met its burden of production, the plaintiff must then demonstrate pretext, by proffering what is essentially a second showing of causation to demonstrate the adverse action would not have occurred but for the plaintiff's protected activity. *Id.* at 861.

There is no dispute that Ms. Alexandru engaged in protected activity and that she suffered an adverse action when she was fired. Thus, the key inquiry in this case is the issue of causation—whether an adverse action was taken by the employer *because* of Ms. Alexandru's protected activity. The resolution of the causation inquiry turns on whether Petitioner may establish a *prima facie* case of retaliation where there is a substantial period of time between the first protected activity and the adverse action and whether close proximity in time is necessary as a matter of law to establish a retaliation claim. Since Ms. Alexandru establishes a *prima facie* of retaliation and there is sufficient evidence to demonstrate pretext, the issue of retaliation should have been decided by the jury under *Reeves*, *supra*, rather than dismissed as a matter of law.

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT IN THE CIRCUITS ABOUT WHETHER CLOSE PROXIMITY IN TIME BETWEEN THE PROTECTED ACTIVITY AND THE ADVERSE EMPLOYMENT ACTION IS A NECESSARY ELEMENT OF A *PRIMA FACIE* CASE OF RETALIATION.

Here, the courts below held as a matter of law that Ms. Alexandru could not prevail on her retaliation claim because seven years had passed since she filed her initial complaint of retaliation. The Second Circuit adopted a *per se* rule barring retaliation claims when a substantial period of time has passed since the employee first engaged in protected activity.

Hollander v. American Cyanamid Co., 895 F.2d 80, 85 (2d Cir. 1990); *Monahan v. United Technologies Corp.*, 113 F.3d 1229 (2d Cir. 1997) (Table).[9]

There is a split in the Circuits regarding the necessity of proximity in time between the protected activity and the adverse employment action. For example, the Tenth Circuit held that an inference of retaliation "can *only* be made, however, where '*close temporal proximity*' exists between the bringing of charges and the subsequent adverse action. *Candelaria v. EG&G Energy Measurements, Inc.*, 33 F.3d 1259, 1262 (10th Cir. 1994) (citation omitted) (emphasis added)(ten-year gap between the EEOC charge and the failure to achieve a promotion is too long to support an inference of retaliation); *Chavez v. City of Arvada*, 88 F.3d 861 (10th Cir. 1996), *cert. denied*, 519 U.S. 1056 (1997). The Tenth Circuit has adopted a rule that a retaliatory inference cannot be drawn when there is a more than three-year gap between the protected activity and the adverse employment decision and strong evidence is necessary when the time gap exceeds three years. The Tenth Circuit has also held that a lag of four months between protected activity and termination was not sufficient to justify an inference of causation. *Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1395 (10th Cir. 1997).

The Fourth Circuit has adopted a similar view, holding that a thirteen month interval between the charge and termination is too long to establish causation absent other evidence of retaliation. *Causey v. Balog*, 162 F.3d 798, 803 (4th Cir. 1998). "A lengthy time lapse between the employer becoming aware of the protected activity and the alleged adverse action, as was the case here, negates any inference that a causal connection exists between the two." *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d

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[9] Although the Court of Appeals did not cite either of these cases, both were cited in NUSCO's Brief filed with the Second Circuit. Brief of Appellee at 33-34.

653, 657 (4th Cir. 1998) (citation omitted) (passage of three years).

The Fifth Circuit also takes a similar view holding that the passage of approximately ten months "is by itself . . . insufficient to prove there was retaliation, in the context of this case it does not support an inference of retaliation and rather, suggests that a retaliatory motive is highly unlikely." *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 263, 268 (5th Cir. 1994) (affirming grant of employee's motion for J.N.O.V. on retaliation claims.) (footnote omitted). Even in a case where statements indicating "clear anger" about the employee's filing a workers' compensation claim were made fifteen to sixteen months prior to his termination, the Fifth Circuit held that "the long period between the workers' compensation claim and the discharge militates against a finding of retaliation." *Burfield v. Brown, Moore & Flint, Inc.*, 51 F.3d 583, 590 (5th Cir. 1995).

The Seventh Circuit goes even further, holding that "substantial time lapse between the protected activity and the adverse action 'is counter-evidence of any causal connection.'" *Johnson v. Univ. of Wisconsin-Eau Claire*, 70 F.3d 469, 480 (7th Cir. 1995) (citation omitted); *Clark v Chrysler Corp.*, 673 F.2d 921, 930 (7th Cir. 1982) (two-year time lapse negated any inference of a causal connection). In subsequent decisions the Seventh Circuit has continued to narrow its definition of "substantial time lapse" so that the passage of only four months prevented plaintiff from establishing a *prima facie* case of retaliation. *Filipovic v. K & R Express Systems, Inc.*, 176 F.3d 390, 399 (7th Cir. 1999).

The Eighth Circuit agrees that the "passage of seven years blunts any inference" of a causal connection. *EEOC v. Cherry-Burrell Corp.*, 35 F.3d 356, 359 (8th Cir. 1994). The First Circuit takes a similar view holding that an employee cannot prove retaliation where there was a passage of two and

one-half years. *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 110-111(1st Cir. 1988).

The Eleventh Circuit has adopted a contrary rule that a lack of temporal proximity is not an automatic bar to a retaliation suit. Under the Eleventh Circuit's case law, "the causal link requirement under Title VII must be construed broadly; 'a plaintiff merely has to prove that the protected activity and the negative employment actions are not completely unrelated.'" *Olmstead v. Taco Bell*, 141 F.3d 1457, 1460 (11th Cir. 1998), citing *EEOC v. Reichhold Chemicals, Inc.*, 988 F.2d 1564, 1571-1572 (11th Cir. 1993); *Beckwith v. City of Daytona Beach Shores*, 58 F.3d 1554, 1555 (11th Cir. 1995).

The Third Circuit has adopted a similar view. "The mere passage of time is not legally conclusive proof against retaliation." *Robinson v. Southeastern Pennsylvania Transportation Authority ("SEPTA")*, 982 F.2d 892, 894-895 (3d Cir. 1993) (citation and footnote omitted) (affirming finding of retaliation despite the passage of almost two years where there was an "intervening pattern of antagonism").

Under the Eleventh Circuit rule, Ms. Alexandru would have had to present evidence to raise the inference that her protected activity was the likely reason for the adverse action and that the protected activity and the adverse action "are not completely unrelated." Here, Ms. Alexandru established a *prima facie* case of retaliation because she did all she was required to do; she presented sufficient evidence at trial to support a finding of causation because NUSCO witnesses conceded at trial that there was a connection between the 1985 complaints of sexual harassment and the subsequent grievances and her termination in 1992. Similarly, under the Third Circuit rule, where there is an "intervening pattern of antagonism," Ms. Alexandru can establish a *prima facie* case of retaliation.

Ms. Alexandru demonstrated that after she complained of sexual harassment, NUSCO denied her assignments commensurate with her skill as an engineer. When NUSCO gave Ms. Alexandru work, the company assigned menial tasks to Ms. Alexandru. Even though for much of the time between 1985 and 1992, Ms. Alexandru had nothing to do, NUSCO nevertheless gave Ms. Alexandru poor evaluations because she failed to demonstrate any accomplishments in her position. NUSCO failed to provide any legitimate business reason for relying on its prior refusal to give Ms. Alexandru assignments to justify her termination.

Courts of Appeal hold that the employee must demonstrate that the employer was aware of the protected activity. However, there is no additional requirement that the employee must demonstrate that specific persons are aware of the prior protected act—only that the decision-makers knew.

Ms. Alexandru provided evidence to demonstrate that the decision-makers employed by NUSCO were aware of her protected activity and that her prior complaints were considered when she was terminated. *See Harris v. Secretary, U.S. Dep't of the Army*, 9 F.3d 1313, 1318 (8th Cir. 1997) (employee engages in protected conduct by complaining of discrimination).

The Grievance Committee which rejected Ms. Alexandru's 1992 complaints of discrimination did so after recognizing that Ms. Alexandru was raising complaints of sex discrimination, not just a grievance. This Committee's decision on her 1992 complaint was made in reliance on NUSCO's prior decision that Ms. Alexandru was a problem employee and was not the victim of discrimination or retaliation. This finding shows a clear connection between the 1985 claims of discrimination and the 1992 decision to fire Ms. Alexandru.

As Ms. Singer testified, the termination process was controlled by the Human Relations Department, which

exercised a veto over all proposed disciplinary action. Thus, the power to make the decision to terminate Ms. Alexandru rested with Human Relations, not with Messrs. Kornacki and Smart.

Second, the officials charged with the decision to reject Ms. Alexandru's grievance and then fire her were fully aware of her 1985 complaint of sexual harassment and the grievances that followed. In fact, these NUSCO officials admitted in writing that they held discussions with persons involved in Ms. Alexandru's prior complaints of discrimination. Pl. Ex 291. NUSCO officials considered the criticisms of Ms. Alexandru's performance made by the officials who were previously charged with sexually harassing her when they made the 1992 decision to terminate her.

The NUSCO officials who decided Ms. Alexandru's 1992 complaints lacked merit did so only after concluding that this was so because her prior complaints filed in 1985 and 1988 lacked merit. The 1992 rejection of Ms. Alexandru's grievance and her termination were based on the finding that there was a "pattern of response by the Grievant to efforts to conduct constructive appraisals of performance. . . ." NUSCO rejected Ms. Alexandru's 1992 complaints after concluding she had a bad attitude and that her current complaints were simply a repeat of past complaints, which the company had previously rejected.

The Second Circuit's application of its a *per se* rule requiring close temporal proximity illustrates the error of this approach. This approach to the timing issue replaces a fact-bound, common sense inquiry with an artificial rule of law. Resolving this question requires careful consideration of all the evidence and any logical inferences drawn from that evidence. Undue focus on timing distorts this well-established sufficiency of the evidence formula and does not help resolve intent questions like the one raised in this case.

Beckwith v. City of Daytona Beach Shores, supra, 58 F.3d at 1556 (citation omitted).

The adoption of a *per se* rule making the passage of time sufficient to defeat retaliatory discharge claims as a matter of law would give employers "a fail-safe recipe" for avoiding retaliation claims. *Id.* An employer, such as NUSCO, could take away an employee's professional duties and subject her to continuing harassment and retaliation, but avoid legal liability for the unlawful retaliation by waiting a "decent interval" before actually firing the employee. A reasonable jury could find that the initial complaint of sexual harassment and discrimination caused Ms. Alexandru's and NUSCO's relationship to deteriorate and set a pattern of behavior that NUSCO followed in assigning Ms. Alexandru to dead-end jobs with menial tasks and low-level responsibilities in retaliation for Ms. Alexandru's engaging in protected activities, which ultimately led to her termination. *Robinson v. SEPTA, supra,* 982 F.2d at 895 (citation omitted)

Petitioner provided sufficient evidence to establish a *prima facie* case of retaliation. The Court should grant the Petition to resolve the split in the Circuits regarding appropriate standard for resolving retaliation cases where there is a substantial passage of time between the protected activity and the adverse action, and to correct the Second Circuit's error below in adopting a *per se* rule requiring dismissal of Ms. Alexandru's claims.

II. THE SECOND CIRCUIT'S DECISION IS BASED ON THE NOW DISCREDITED "PRETEXT PLUS" REQUIREMENT AND IS INCONSISTENT WITH THIS COURT'S DECISION IN *REEVES*

Initially, we note that the Second Circuit is one of those circuits whose pretext plus analysis was rejected by this Court's decision in *Reeves, supra,* 120 S. Ct. at 2109. *See,*

e.g., Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1075 (1998); *McCarthy v. New York City Technical College of City Univ. of New York*, 202 F.3d 161 (2nd Cir. 2000). Further the trial court explicitly stated that it was imposing the "pretext plus" burden on Ms. Alexandru in analyzing the evidence.

The Second Circuit specifically grounded its rejection of Ms. Alexandru's appeal on Fed.R.Civ.P. 50(a)(1), stating Ms. Alexandru failed to provide a "legally sufficient evidentiary basis, on which the jury might find in her favor." This legal error is based on the Court of Appeals' misapprehension regarding the requirements of Rule 50(a)(1) and the consequences flowing from its erroneous "pretext plus" doctrine.

This Court's decision in *Reeves* reasoned that it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. *Id.* at 2108 (emphasis added). "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id., citing St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 517 (1993).

The role of the jury must be preserved with respect to the determination of credibility, the weighing of evidence and the drawing of legitimate inferences from the facts. Under *Reeves*, there was sufficient evidence presented at trial to allow the jury to find that Ms. Alexandru was the victim of retaliation when she was terminated. Ms. Alexandru presented sufficient evidence to demonstrate that the decision-makers working for her employer had knowledge of her 1985 complaints of sexual harassment prior to the time that her employer fired her. Indeed, NUSCO made the decision that Ms. Alexandru's 1992 grievance lacked merit because she had previously shown that she could not take direction, as evidenced by the rejection of her 1985 grievance. NUSCO

reached that conclusion after conferring with the very men who had sexually harassed Ms. Alexandru, or who had refused to respond to her complaints. As Ms. Singer testified at trial, NUSCO's initial premise in deciding that Ms. Alexandru's 1992 complaints of discrimination were without merit and that the problem was Ms. Alexandru and not any of NUSCO's male employees, was based on events surrounding Ms. Alexandru's 1985 complaint.

Thus, a reasonable jury could find that NUSCO retaliated against Ms. Alexandru because she engaged in protected activity. Ms. Alexandru could also show a causal connection between the protected activity and the adverse action because, as Ms. Singer testified, NUSCO considered Ms. Alexandru's 1985 complaint of sexual harassment and retaliation when the decision to reject Ms. Alexandru's 1992 grievance was made.

Further, NUSCO officials consulted with unidentified persons in determining that Ms. Alexandru was a complainer who was unwilling to take direction. At no time did NUSCO officials ever conduct an even handed investigation, either in 1985-1988, or in 1992, or ask Ms. Alexandru about her view of events in 1985-1986, prior to rejecting her complaints in 1992. NUSCO's failure in 1992 to ever ask Ms. Alexandru about her side of the story is sufficient evidence to support a finding of pretext and to create a factual dispute regarding the real reason for Ms. Alexandru's termination. If NUSCO really wanted to conduct an impartial investigation, rather than create a paper justification for firing Ms. Alexandru, the company would surely have asked Ms. Alexandru about the earlier sexual harassment.

NUSCO articulated various reasons to support Ms. Alexandru's termination. For example, NUSCO criticized Ms. Alexandru's job performance, stating Ms. Alexandru failed to demonstrate "team work, the quality and quantity of her work, her decision making and communication skills." NUSCO also cited Ms. Alexandru's "refusal" to count fish at

night on unprotected river banks as a reason for her termination. In addition, NUSCO argues that the termination was justified because Ms. Alexandru was not at her desk on several occasions and that she was "insubordinate."

There is more than ample evidence in the record that these reasons were pretextual. Here the evidence at trial on the retaliation claims contained evidence from which a reasonable jury could have found that defendants were lying as to the real reason for firing Ms. Alexandru.

After she filed her complaint of sexual harassment, NUSCO failed and refused to give Ms. Alexandru regular duties and responsibilities commensurate with her education and experience and indeed, there is little dispute about the absence of appropriate duties. In fact, Ms. Alexandru's performance evaluation for 1991 even acknowledges that Ms. Alexandru did not have work to perform during much of the relevant time period. Pet. App. 124-128. But it is nonsensical for NUSCO to rely on Ms. Alexandru's failure to demonstrate her "team work, the quality and quantity of her work, her decision making and communication skills" where NUSCO denied Ms. Alexandru the opportunity to demonstrate these skills. NUSCO certainly cannot rely on Ms. Alexandru's "failure" in her job performance to justify the decision to fire Ms. Alexandru where NUSCO denied her an opportunity to succeed.

Nor can the claimed refusal to count fish at night on unprotected river banks support Ms. Alexandru's termination. NUSCO never advanced any legitimate business reason for assigning a highly educated and trained engineer such as Ms. Alexandru to this position, rather than giving her assignments related to her skill and experience. Nor did NUSCO ever explain why the fish counting had to be done on a 24-hour a day basis and how Ms. Alexandru was supposed to count fish in the dark. Even though NUSCO witnesses testified that the fish counting project was important, the cancellation of the

project never had any adverse impact on NUSCO. The fact the NUSCO managers lied when they claimed counting fish was important supports Ms. Alexandru's claims of pretext.

When the evidence is viewed in a light most favorable to Ms. Alexandru, it is clear that Ms. Alexandru did not actually refuse to participate in the fish counting. Ms. Alexandru rather simply voiced legitimate concerns regarding her safety if she worked after dark, but agreed to perform this "make-work" assignment during the day. Based on evidence presented at trial, a reasonable jury could find that NUSCO decided to further retaliate against Ms. Alexandru by using this assignment to manufacture a justification for firing her. A jury could find that NUSCO created a demeaning "make work" assignment for Ms. Alexandru that would either pressure Ms. Alexandru to resign or would provide a pretext for her subsequent termination. Where the employer advances an inherently implausible explanation for its actions, this is sufficient to create a factual issue to be decided by the jury. *Byrd v. Lakeshore Hosp.*, 30 F.3d 1380, 1383 (11th Cir.1994).

Similarly, NUSCO's explanation for why Ms. Alexandru's occasional absence from her desk justified her termination is flawed. NUSCO never explained why Ms. Alexandru's supervisors were monitoring her activities or why there was such a strong objection to Ms. Alexandru's use of the bathroom during work hours when there was no work for Ms. Alexandru to do. A reasonable jury could find that NUSCO was simply grasping at straws to justify a decision to fire Ms. Alexandru for retaliatory reasons.

Further, where there is evidence that a proffered reason is pretextual, then the proffer is itself evidence of discrimination. "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Reeves, supra,* 120 S. Ct. at 2108. The lower

courts failed to consider the evidentiary value of defendants having proffered inadequate and pretextual explanations for firing Ms. Alexandru.

A reasonable jury could find that NUSCO engaged in continuing retaliation against Ms. Alexandru for complaining about sexual harassment by assigning her to positions which had no duties and no opportunity for promotion or replacement in other positions at NUSCO.

CONCLUSION

The Petition for a Writ of Certiorari should be granted to resolve these issues of national importance regarding the requirement that the protected activity and the adverse action be closely related in time and whether the *per se* rule is inconsistent with this Court's decision in *Reeves*. The Petition should also be granted because the decisions of the Court of Appeals is flatly inconsistent with *Reeves*. Alternatively, we respectfully request the Court grant the Petition, vacate the judgment of the Court of Appeals for the Second Circuit, and remand for reconsideration in light of *Reeves*.

Respectfully submitted,

JOHN F. KARL, JR. *
MCDONALD & KARL
900 17th Street, N.W.
Suite 1250
Washington, D.C. 20006
(202) 293-3200

* Counsel of Record

Counsel for Petitioner

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 27th day of January, two thousand.

PRESENT:

Pierre N. Leval,
Fred I. Parker,
Robert A. Katzmann,

Circuit Judges

99-7611

MICHAELA I. ALEXANDRU.
Plaintiff-Appellant,

v.

NORTHEAST UTILITIES SERVICE COMPANY,
Defendant-Appellee.

APPEARING FOR PLAINTIFF-APPELLANT:
MICHAELA I. ALEXANDRU, *pro se*, Cheshire, CT.

APPEARING FOR DEFENDANT-APPELLEE:
ALICIA B. DAVENPORT, Senior Counsel.
Northeast Utilities Service Company, Hartford, CT.

Appeal from the United States District Court for the District of Connecticut (Nevas, J.)

Following a jury verdict in favor of the defendant on her Title VII claim alleging sexual discrimination and harassment, Plaintiff Michaela I. Alexandru appeals from orders of the United States District Court for the District of Connecticut dismissing three additional claims for retaliation, breach of an implied covenant of good faith and fair dealing, and intentional infliction of emotional distress. In addition, Alexandru appeals from the district court's decision to exclude from evidence certain business records, medical records and witnesses.

The district court properly granted Northeast Utilities judgment as a matter of law on Alexandru's claims for retaliation and for breach of an implied covenant, because she failed to provide a "legally sufficient evidentiary basis," Fed. R. Civ. P. 50(a)(1), on which the jury might find in her favor. Alexandru never countered the testimony of her supervisor and manager that they were unaware that she had filed any grievances. Thus, she failed to establish a crucial element of a prima facie case of retaliation--namely, that Northeast Utilities

was aware of the protected activity, which, she claims, led it to retaliate against her. Likewise. Plaintiff offered no evidence that she had entered any express or implied contract with Northeast Utilities limiting the duties to which she might be assigned. For this reason, Northeast Utilities did not breach any implied covenant of good faith and fair dealing by assigning her allegedly menial tasks.

The district court correctly granted Northeast Utilities summary judgment on Alexandru's claim for intentional infliction of emotional distress, because she failed to raise "genuine issue[s] as to any material fact." Fed R. Civ. P. 56(c). To sustain a claim for intentional infliction of emotional distress, Alexandru must show that Northeast Utilities engaged in "conduct exceeding all bounds usually tolerated by decent society." *DeLaurentis v. City of New Haven*, 597 A.2d 807, 828 (Conn. 1991) (internal quotation omitted). Alexandru failed to allege any facts rising to the level of "outrageous[ness]," id., required by Connecticut law, and thus summary judgment in favor of Northeast Utilities was appropriate.

We also affirm the district court's evidentiary rulings. "Evidentiary rulings ordinarily will not be overturned, absent an abuse of discretion," *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 150 (2d Cir.1997), and the record does not indicate that any such abuse occurred.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

FOR THE COURT:

KAREN GREVE MILTON, ACTING CLERK

By: Lucille Carr, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE, *clerk*

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the tenth day of May two thousand.

Dkt No: 99-7611

ALEXANDRU

Appellant,

v

NUSCO

Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant MICHAELA ALEXANDRU.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT:

ROSEANN B. MACKECHNIE, Clerk

By: BETH J. MEADOR, Administrative Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 3:95cv0461 (HBF)

MICHAELA ALEXANDRU

v.

NORTHEAST UTILITIES

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Holly B. Fitzsimmons, United States Magistrate Judge, and the issues having been duly tried and the jury have duly rendered its verdict on May 21, 1999,

It is hereby ORDERED and ADJUDGED that judgment be and hereby is entered in favor of the defendant, in accordance with the Jury's verdict.

Dated at Bridgeport, Connecticut this 16th day of June, 1999.

KEVIN F. ROWE,

By /s/_____

CAROL E. CANNADY
Deputy in Charge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 3:95cv0461 (HBF)

MICHAELA ALEXANDRU

v.

NORTHEAST UTILITIES

EXCERPTS FROM TRIAL

THE COURT: "All right, now you understand that not only do you have to prove that the reason that Northeast Utilities gave for terminating your employment was a pretext, but that the actual reason was sex discrimination, gender discrimination." Trial Transcript, May 7, 1999, at 22; Pet. App. at 82.

* * * *

THE COURT: "Yes, but Ms. Alexandru, if what you're doing is addressing the retaliation claim, the lapse of time between early 1980 and the situation when you were working for Mr. Kornacki, makes the continuation of claim a problem, particularly when the grievances that were filed in the interim were not sexual harassment grievances. You can't draw -- I can't allow the jury to call an inference over that lapse of time and so that the retaliation claim is out." Trial Transcript, May 20, 1999 at 11. Pet. App at 172.

* * * *

THE COURT: "No. The retaliation ruling is based on the fact that there was no showing that the persons that you claimed retaliated against you had any knowledge of the CHRO complaint, or assuming that there was an earlier sexual harassment complaint, which would constitute forbidden activity under Title 7 that they had any knowledge that you

made a sexual harassment complaint. The knowledge is a necessary prerequisite to proving retaliation. It's an essential element of the case, and there is no evidence from which a reasonable jury could conclude that these people had any knowledge if either your sexual harassment complaint, or your CHRO complaint. That's what it's based on." Trial Transcript, May 20, 1999, at 25-26; Pet. App. at 181-182.

* * * *

THE COURT: "There is no evidence from which a reasonable jury could find there was retaliation." Trial Transcript, May 20, 1999, at 29; Pet App. at 184.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the court
202-479-3011

July 31, 2000

Mr. Christopher G. Hoge
Crowley, Hoge & Fein
1717 Massachusetts Ave., N.W.
Washington, DC 20036

Re: Michaela I. Alexandru
v.
Northeast Utilities Service Company
Application No. 00A96

Dear Mr. Hoge:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on July 31, 2000, extended the time to and including October 7, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By

/s/ Loretta S. Ruffin

Assistant Clerk